

89-539

Case No. _____

Supreme Court, U.S.

FILED

APR 13 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1988

JOSEPH ONDRIZEK and CONSTANCE ONDRIZEK
individually and as guardians for
ALISON, AUSTEN and IAN ONDRIZEK,

Petitioners,

vs.

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
- NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

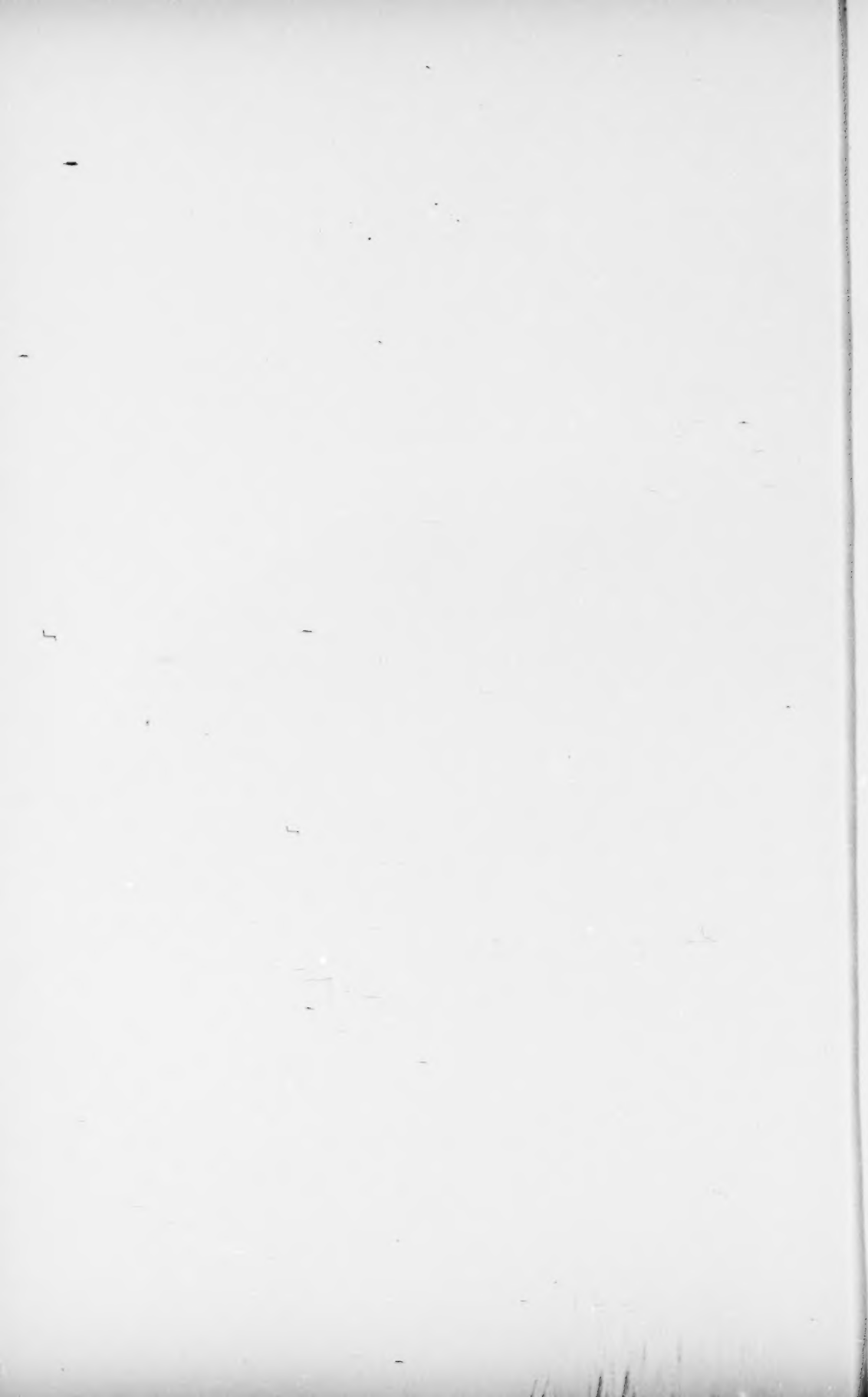
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment to the Constitution grant immunity from suits brought by citizens against their own State government? (i.e., should Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) be overruled?).

2. Can a private person only be held liable in a civil rights suit brought under 42 U.S.C. section 1983 for actions that amount to a "public function"?

3. Is a district court precluded from exercising pendent jurisdiction over a state law claim when the federal claims which otherwise provided the sole basis for subject matter jurisdiction have been dismissed?

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Opinion filed October 26, 1988

Order Granting Defendant's Motion for
Summary Judgment dated April 8, 1988

Order Granting Motion to Dismiss Amended
Complaint dated September 25, 1987

Order Denying Motion to
Dismiss dated July 9, 1987

Judgment to be reviewed entered
January 13, 1989

Order on Rehearing filed
January 4, 1989

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REFERENCE TO OPINION BELOW

Ondrizek, etc., et. al. v. Florida
Department of Health and Rehabilitation
Services and North Central Florida
Community Mental Health Center, Inc.,
Case Nos. 87-5942, 88-5404 & 88-5414,
unpublished opinion filed october 26,
1988; opinion on petition for rehearing
filed January 4, 1989; judgment of the
court entered January 13, 1989 (11th
Circuit 1989).

BASIS FOR JURISDICTION

This petition for writ of certiorari requests review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit on January 13, 1989. The court had originally issued an opinion filed on October 26, 1988. Upon a timely petition for rehearing, the court issued a subsequent opinion filed on January 4, 1989, before entering judgment. The Court therefore has jurisdiction pursuant to 28 U.S.C. section 1254(1).

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment
XI:

The judicial power of the
United States shall not be
construed to extend to any

suit in law or equity,
commenced or prosecuted
against one of the United
States by Citizens of another
State, or by Citizens or
Subjects of any Foreign State.

42 U.S.C. section 1983:

Every person who, under
color of any statute,
ordinance, regulation, custom
or usage, of any State or
Territory, subjects, or causes
to be subjected, any citizen
of the United States or other
person within the jurisdiction
thereof to the deprivation
of any rights, privileges or
immunities secured by the
Constitution and laws, shall
be liable to the person
injured in an action of law,
suit in equity, or other
proper proceedings for
redress.

STATEMENT OF THE CASE

This case began in 1984 with the repeated sexual molestation of Alison Ondrizek, who was then five years old.

At that time Alison and her two brothers had been sent to live with their aunt and uncle in Gainesville, Florida, while their mother, Connie Ondrizek, recovered from a mental illness. About five months after the children had been living with these relatives, Alison began to show signs of sexual abuse, prompting her aunt to bring her into an office of the Florida Department of Health and Rehabilitative Services (hereinafter "HRS").

Alison was observed in the presence of an HRS official and a police officer, who determined that she likely had been sexually abused. HRS then placed Alison in the temporary custody of her aunt, and told her to take Alison to the North Central Florida Community Mental Health Center, Inc. (hereinafter "MHC"), for the purpose of substantiating charges of sexual abuse and neglect by the Ondrizeks, and to make recommendations for the permanent placement of the Ondrizek children.

MHC is a nonprofit corporation established under the Florida Mental Health Act, Florida Statute sections 394.451 et seq. Virtually every aspect of this agency's operations is regulated by HRS directly and indirectly, from the

services provided for patients to personnel decisions, pursuant to provisions of the Florida Administrative Code. These regulations are imposed through contracts entered into between HRS and MHC, the performance of which is monitored very heavily by HRS.

Of a total yearly revenue of \$7.5 million received by MHC, all but approximately \$800,000 is received through contracts with HRS. HRS and its employees are even covered by MHC's insurance policy, as part of the operations of MHC.

MHC was contacted by HRS for the referral of Alison, who was seen on a number of occasions by a therapist. The therapist determined that Alison had been abused, but could not identify the

perpetrator because Alison would not confide in her. .

Later, after she had been returned to her parents, Alison was to identify her aunt's teenage son as the person who had sexually molested her while she was living in Gainesville.

But at the time, after confirming probable sexual abuse, the MHC therapist advised HRS officials of this abuse and recommended that Alison and her two brothers be permanently placed with their aunt and uncle through court action.

The therapist later testified that it never occurred to her that the source of the abuse was taking place in the home where the children had been living for

several months.

After an extended period of time, HRS eventually filed dependency proceedings against the Ondrizeks on the basis of the recommendations made by MHC.

On May 23, 1985 the juvenile court in Gainesville granted an emergency detention petition filed by HRS against the Ondrizeks. A few days later, at a family reunion where the Ondrizeks were to be reunited with their children, the aunt called the police to enforce the court order, in the presence of the children.

During the course of the events transpiring in Gainesville concerning their children, the Ondrizeks were never notified. They were also never served

with process, nor otherwise notified of the dependency proceedings that took place in Gainesville.

Eventually, after a number of court hearings, the children were placed back with their parents and custody was restored in January of 1986, pursuant to a negotiated settlement.

An action was commenced against HRS and MHC in the district court by the Ondrizeks and their children. The complaint was filed under 42 U.S.C. section 1983, 29 U.S.C. section 794 (the "Rehabilitation Act") and under the common law for negligence. Jurisdiction was predicated on 28 U.S.C. sections 1331 and 1343, and under the doctrine of pendent jurisdiction.

The federal claims against HRS were dismissed on the basis of the Eleventh Amendment to the Constitution. The state claim was dismissed on the ground that the court had no power to assert pendent jurisdiction. An appeal was filed from this ruling.

MHC also sought dismissal of the suit, for lack of state action. The district court initially denied this request, holding that:

Private persons jointly engaged in deliberate action with state officials in the challenged action are acting "under color of" state law for purposes of section 1983. (citations omitted).

Several months later MHC again argued lack of state action in the form of a motion for summary judgment. The Ondrizeks again argued in response that,

if not a state actor itself, MHC had acted jointly with HRS, and that there were sufficient controls imposed upon MHC by HRS to constitute state action.

On the eve of trial, the district court granted summary judgment in favor of MHC on the federal claims and dismissed the pendent state law claim for want of jurisdiction.

Despite its earlier ruling, the district court held that, while the performance of a public function by a private person such as MHC may be attributed to the state, such an attribution of state action to a private individual was appropriate only when that person performs a function "exclusively reserved to the state." Finding that MHC performed no public

function, the court concluded no state action had been established.

Thereafter, the district court imposed Rule 11 sanctions against counsel for the Ondrizeks personally for bringing the action.

The Ondrizeks filed another appeal of this ruling to the Eleventh Circuit Court of Appeals, and consolidated this appeal with the earlier appeal taken from the order dismissing HRS from the action.

On October 26, 1988, the Court of Appeals affirmed the various orders of the district court on the grounds that the Eleventh Amendment barred the suit brought by the Ondrizeks, and that the court had no power to exercise pendent

jurisdiction over the state law claims brought against HRS.

Upon petition for rehearing, the Circuit Court acknowledged that the earlier opinion had overlooked the state action issue, and then summarily affirmed the ruling on that question for the reasons stated by the district court. The Court also held, inter alia, that the dismissal of the pendent claim against MHC was not an abuse of discretion.

Thereafter, on January 13, 1989, judgment was entered by the Court of Appeals affirming the decision of the district court.

REASONS FOR GRANTING THE WRIT

This case presents issues of constitutional law that are sufficiently important to call for the extraordinary exercise of the Court's discretion to review the decision of the Eleventh Circuit Court of Appeals by way of writ of certiorari.

Upon granting review of this matter and the scrutiny of the record as briefly described in this petition, the decision of this Court upon the merits will have a profound effect on the application of federal civil rights law to rectify widespread violations of the constitutional rights of families and others by social service and other agencies.

Already this term the Court has had occasion to clarify other unrelated aspects of the law in this area under a similarly tragic set of facts. See, Joshua DeShaney v. Winnebago County Department of Social Services, 57 U.S.L.W. 4218 (opinion filed February 22, 1989). As in that case, the Court should grant review herein to resolve issues of importance to the administration of state and local governments, 57 U.S.L.W. 4219, as well as to the administration of the courts.

More specifically, Petitioners pray that this Court grant review for the following reasons:

THE IMMUNITY ISSUE

The Eleventh Amendment to the United

States Constitution states that citizens of one state may not bring suit in federal court against another state. Despite the express terms of this amendment to the contrary, in Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) the Court held that this amendment also bars suits brought by citizens against their own state government.

The justification for applying the Eleventh Amendment in such a manner arose from the interpretation of the amendment as a form of sovereign immunity that is also in the nature of a jurisdictional limitation on the power of the federal courts. See, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 906, 79

L.Ed.2d 67 (1984).

Since the decision in Hans, the common law theory of sovereign immunity has fallen into considerable disuse, primarily through the passage of legislation, by both the federal and state governments waiving immunity and providing procedures for the compensation of victims of unlawful government actions.

But while the concept of sovereign immunity has been largely discarded as a matter of public policy by the government itself, the constitutional theory of this type of immunity created nearly one hundred years ago by the Court in Hans perpetuates a form of immunity that has now become a legal anachronism.

The devastating impact of this outdated and conceptually flawed interpretation of the Eleventh Amendment has already prompted four members of this Court in recent years to call repeatedly for the overruling of Hans. See, Welch v. Texas Dep't of Hwys and Public Transp., 107 S.Ct. 2941, 2948 (1987)(cases collected in plurality opinion).

Aside from the historical record that sovereign immunity, which ironically is derived from the ancient premise that "the king can do no wrong", does not support the view that the authors of the constitution in adopting the Eleventh Amendment intended to establish a constitutional principle of sovereign immunity, the plain language of the

amendment precludes this interpretation imposed by the Court in Hans. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 259-302 (1985) (Brennan, J., dissenting).

But apart from the moral imperative to overrule Hans, as aptly illustrated by the facts in this case, the Court should also do so towards a more modern view of public policy that is recognized by the government itself.

The vast system of laws in society today provide standards of conduct to which people and other entities must conform, and a mechanism by which these standards are enforced. There is no practical or other reason why the errant conduct of governmental entities should be exempt from this system.

Indeed, the plurality in Welch, while acknowledging that the doctrine is not rigidly followed in constitutional cases, defends the continued adherence to Hans primarily on the basis of stare decisis, as opposed to any compelling interpretative or policy considerations. 107 S.Ct. 2948-2957.

Petitioners submit that the language and history of the Eleventh Amendment as originally intended, when taken together with the development of legal theory and policy since the year 1890, provides more than sufficient "special justification" for departing from Stare decisis.

Accordingly, upon granting certiorari, the Court should overrule Hans.

THE STATE ACTION ISSUE

The district court below in granting summary judgment expressed the view that a private entity such as the Mental Health Center can only be held liable under section 1983 for the performance of a "public function." The Circuit Court of Appeals, by summarily affirming this ruling for the reasons contained therein, approved this holding of the district court.

Section 1983, however, does not require that a private defendant perform a public function in order to establish state action on the part of that defendant. The proper test is whether the actions of that party are fairly attributable to the state.

Rendell-Baker v. Kohn, 457 U.S. 830,
102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

In Rendell-Baker the Court explained how under various theories the actions of a private person may become state action for purposes of liability under section 1983. The "public function" theory is just one of these theories.

Although the district court, without reference to the record, unfairly and incorrectly characterized the argument of Petitioners as calling for the conclusion that the "evaluation and treatment" of Alison amounted to a public function, in fact Petitioners relied for their theory of state action on the extensive regulation and subsidization of MHC by HRS, and the actions of MHC taken in concert with HRS

officials — towards the eventual
seperation of the Ondrizek family.

These theories were recognized, at least in part, by the district court's earlier ruling that "[p]rivate persons jointly engaged in deliberate action with state officials in the challenged action are acting 'under color of' state law for purposes of section 1983."

The subsequent misapplication of an alternative theory of state action by the district court as a requisite to liability is an example of continued confusion in this area of the law that the Court had sought to clarify in the Kohn case.

In Kohn, the Court rejected claims under section 1983 by teachers who were

terminated from their positions at a privately operated school, because the state did not exercise control over the personnel decisions of the school. 102 S.Ct. 2771 to 2772. Unlike the employment decisions involved in Kohn, the acts and omissions of MHC contributing to the denial of Petitioners' constitutional and statutory rights can be directly traced to the regulations imposed upon MHC by HRS.

This distinction was recognized in Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), in which students brought an action for violation of their civil rights against a private school that had implemented a program using certain "behavioral modification" techniques

that grossly infringed on the civil rights of the students. In addition to the close relationship to state agencies through contracts, regulations and funding, the court noted that students were placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents. 691 F.2d 940.

Distinguishing Kohn, the court found that the school's mistreatment of students, as opposed to the personnel actions taken against teachers as in Kohn, provided the "nexus" between the private school and the state that had been found lacking in Kohn. Id. The school was therefore found liable under section 1983.

Similarly, MHC, acting in concert with

HRS, assisted HRS's attempt through the legal process to deprive the Ondrizeks of the custody of their children without probable cause and without providing the Ondrizeks notice and an opportunity to be heard before doing so. The result is that the family's Fourth Amendment rights were violated by being subjected to an unreasonable seizure and because of their forced separation.

In addition, by failing to notify the Ondrizeks of the evaluation and treatment of Alison, MHC subjected the Ondrizeks to the deprivation of their civil rights, and further deprived the Ondrizeks and their children of their right to enjoy an interpersonal relationship as a family, by attempting through "therapy" to separate the

Ondrizek children from their parents for the purpose of having the children placed permanently with their relatives.

The failure of the lower courts to recognize and properly apply the theories of state action established by precedent of this Court calls for the exercise of the Court's power of review to further clarify the apparent confusion over these theories.

THE PENDENT JURISDICTION ISSUE

Finally, this Court should grant review of this case because of the failure of the district court, affirmed by the Court of Appeals, to exercise pendent jurisdiction over Petitioners' state law claims, even after the federal

claims had been dismissed.

In doing so, the district court held that the court had no power to assert such jurisdiction after the federal claims were no longer before the court, without applying the analysis set forth in United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

The Circuit Court itself recognized, however, that, although ordinarily under these circumstances the federal court should decline to exercise pendent jurisdiction, the court in a proper case may do so under the authority of Carnegie-Mellon University v. Cohill, 108 S.Ct. 614, 619 n. 7. (1988).

In the instant case, after a year of litigation in which significant pretrial

proceedings had already taken place, the district court granted summary judgment on the federal claims and dismissed the action on the eve of trial. Surely under these circumstances considerations of judicial economy and fairness would support retention of the state claim rather than requiring Petitioners to refile the action in state court.

Instead, the lower court dismissed this claim, without applying the test of whether the federal issues were predominate, whether the state claim arose from a common nucleus of operative fact, or whether Congress intended to negate such an exercise of jurisdiction. Since the court appeared ready to try all of the claims prior to the granting of summary judgment, these

issues would have presumably been resolved in favor of retaining jurisdiction had the court exercised its discretion to do so.

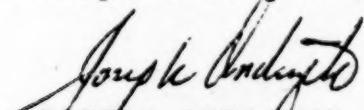
The Court should accordingly after the granting of review over this important procedural question, direct the lower court to exercise pendent jurisdiction over the state claim here presented upon remand for further proceedings.

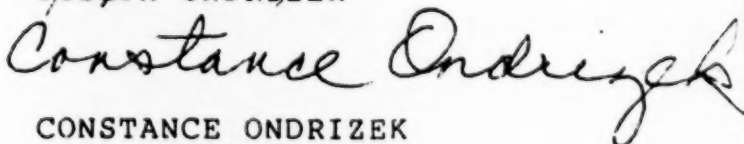
CONCLUSION

For all of the foregoing reasons, Petitioners pray that the Court grant review of the decision of the Eleventh Circuit Court of Appeals in their case, and that the Court thereupon reverse and remand this matter for further proceedings.

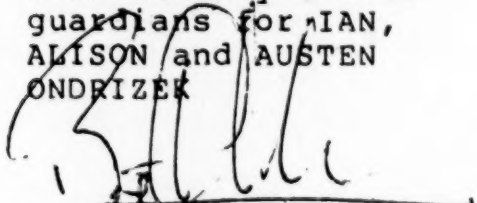
ated this 8th day of April, 1989.

Respectfully submitted,


JOSEPH ONDRIZEK


CONSTANCE ONDRIZEK

Individually and as
guardians for IAN,
ALISON and AUSTEN
ONDRIZEK


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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 87-5942, 88-5404, 88-5414
Non-Argument Calendar

D.C. Docket No. 87-0682

JOSEPH ONDRIZEK and
CONSTANCE ONDRIZEK, individually
and as guardians for ALISON
AUSTEN and IAN ONDRIZEK,

Plaintiffs-Appellants,

versus

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants-Appellees.

Appeals from the United States District
Court for the Southern District of Florida

(October 26, 1988)

Before FAY, HATCHETT and ANDERSON,
Circuit Judges.

PER CURIAM:

This case comes to us on appeal from the United States District Court for the Southern District of Florida. The district court dismissed the claims filed against the Florida Department of Health and Rehabilitative Services ("HRS") for lack of jurisdiction. We agree that the Eleventh Amendment barred the suit against HRS, and, therefore, affirm the district court's ruling.

The Ondrizeks sued both HRS and the North Central Florida Community Mental Health Center, Inc. ("North Central"). Joseph and Constance Ondrizek alleged that HRS and North Central unfairly deprived them of the custody of their children, Alison Austen and Ian Ondrizek, and, in so doing, violated

their constitutional rights to due process and equal protection under 42 U.S.C. section 1983 (1982), and their rights under the Rehabilitation Act. 29 U.S.C. section 794 (1982 & Supp. III 1985). In addition, the Ondrizeks asserted that the defendants were guilty of common law negligence, and asked that the trial court consider the state law claims under the theory of pendent jurisdiction.

Initially, HRS did not respond to the Ondrizeks' complaint, and the district court entered a default judgment against it. The district court, however, granted HRS' motion to set aside the default based on "excusable neglect." Subsequently, HRS asserted immunity from the lawsuit based on the Eleventh

Amendment. The district court agreed and dismissed the federal claims. In addition, the court stated that, "[l]acking jurisdiction of the federal claims, this court is without the power to adjudicate the pendent state claim." However, the court did not dismiss the claim against North Central at that time.

The Ondrizeks have appealed the dismissal of HRS from the lawsuit to this court. They raise three arguemnts as to why the Eleventh Amendment does not bar their suit. First, they contend that the Eleventh Amendment, as written, was not meant to apply to suits brought by citizens of a state against their own states. Second, they argue that the Eleventh Amendment does not apply to

suits that seek declaratory and injunctive relief. Third, they claim that, even if HRS is immune from suit, HRS has waived its immunity with respect to the federal claims by its procedural default, and has waived its immunity with respect to the state claim by its failure to raise the immunity defense. HRS disputes all of these contentions. Further, HRS states that this court has no jurisdiction to consider these questions because there was never a final appealable judgment.

Before we can consider any of the Ondrizeks' contentions, we must determine whether HRS is correct in asserting that we have jurisdiction to decide whether there is jurisdiction. HRS argues that, because the district

court's order did not dismiss North Central from the case, there is no final order from which the Ondrizek's can appeal. We agree that, in general, when there has been no final order, no appeal is possible. 28 U.S.C. section 1291 (1982); see In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 235 (5th Cir. Unit B 1982). However, an order subsequently issued by the district court has finally resolved the case by granting North Central's motion for summary judgment. And, as this court stated in Rivers v. Washington County Board of Education, 770 F.2d 1010, 1011 (11th Cir. 1985) (per curiam), "courts will consider 'the separate appeal of a nonfinal judgment where a subsequent judgment of the district court effectively terminates

the litigation.'" (quoting Martin v. Campbell, 692 F.2d 112, 114 (11th Cir. 1982)). Therefore, we can move on to the Eleventh Amendment questions raised in this appeal.

The Eleventh Amendment
Bars Federal Suits
brought by citizens against
its (sic) own state

In 1890, the Supreme Court of the United States unequivocally declared that, under the Eleventh Amendment, federal courts do not have jurisdiction to consider claims brought against a state by its own citizens. Hans v. Louisiana, 134 U.S. 1, (1890). Although in recent years the doctrine has met with some criticism,¹ it has not been overruled by statute or by the Supreme Court. See, Papasan v. Allain, 478 U.S.

265, 106 S.Ct. 2932, 92 L.Ed.2d 209, 225
(1986)(adhering to Hans rule);
Atascadero State Hospital v. Scanlon,
472 U.S. 234, 237-38 (1985)(following
Hans). Because we are bound by Supreme
Court precedent, we refuse to even
consider the merits of the Ondrizeks'
arguments in favor of overruling Hans.²

No exceptions apply to
permit this lawsuit

Despite the general rule, "[t]here are
... certain well-established exceptions
to the reach of the Eleventh Amendment."
Antascadero, 473 U.S. at 238. The
Ondrizeks argue that their case falls
within two of these exceptions. First,
they claim that they have asked for
injunctive as well as monetary relief.
They argue that the Eleventh Amendment

does not apply to suits in which injunctive relief or declaratory relief is sought, and that, therefore, the amendment does not operate to preclude the district court from considering their request for injunctive relief. Second, the Ondrizeks claim that HRS has waived its Eleventh Amendment immunity.

We reject both of these arguments. First, we acknowledge that, in some cases, equitable actions brought against state officials raise no Eleventh Amendment problems. See Edelman v. Jordan, 415 U.S. 651, 663-69 (1974). Because a state has no authority to instruct officials to engage in unconstitutional conduct, for example, "a suit challenging the constitutionality of a state official's

action is not one against the State." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102 (1984); Ex Parte Young, 209 U.S. 123, 160 (1908). Therefore, federal courts may hear such lawsuits without violating the Eleventh Amendment.

However, the Supreme Court has clearly distinguished the situation described above, in which a state official is sued, from one in which the state or a state agency is sued. In the latter cases, the Eleventh Amendment bar remains, whether the plaintiff has sought legal or equitable relief. Papasan v. Allain, 92 L.Ed.2d 209, 225-26 (1986); Pennhurst, 465 U.S. 89, 100-02 (1984). HRS is a state agency; therefore, Supreme Court precedent bars

the Ondrizeks' claim for equitable relief as well as their claim for monetary relief.

Second, we find that there was no waiver of Eleventh Amendment immunity. HRS' initial procedural default has no effect because, as the Supreme Court declared in Edelman, the defense of Eleventh Amendment immunity "sufficiently partakes of the nature of a jurisdiction bar so that it need not be raised in the trial court." Edelman, 415 U.S. at 678. This bar is only lifted when a state clearly waives its immunity from suit in federal court in its constitution, its statutes, or its courts' decisions. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 467 (1945); Silver v.

Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986). The Florida constitution limits the state's ability to waive its immunity from suit. It states: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Fla. Const. art. X, section 13 (emphasis added). Thus, only an "explicit act of the state legislature" is effective to waive the state's Eleventh Amendment immunity. *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, 734 (11th Cir. 1984); see also *Hess v. Metropolitan Dade County*], 467 So.2d 297, 300 (1985) (reaching identical conclusion in context of state's sovereign immunity). Since Florida has not waived its Eleventh Amendment

immunity in section 1983 cases, see Hill v. Department of Corrections], 513 So.2d 129, 133 (Fla. 1987), there is no basis for finding a waiver in this case.

Pendent state law claim

Finally, the Ondrizeks state that the district court erred in dismissing their pendent state claim. They concede that the court was not obligated to exercise jurisdiction over the state law claim, even if it had the power to hear those claims. In this case, however, the district court stated that it had no power to hear the claims because it had dismissed the federal claims. The Ondrizeks argue that the district court did have the power to hear the pendent

claim even though the federal claims had all been dismissed prior to trial. Therefore, the Ondrizeks allege, the district court did not make the discretionary determination required of it by law and its decision cannot stand.

We disagree. The Ondrizeks are correct in stating that, whenever a district court has the power to hear a pendent state claim, it also has great discretion in determining whether to exercise that power. "Under [United Mine Workers v. Gibbs, 383 U.S. 715 (1966)], a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to

exercise jurisdiction over a case brought in that court involving pendent state law claims." *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 618 (1988). In cases in which the federal claims are all dismissed before trial, the federal court should generally decline to hear the state claims. *Cohill*, 108 S.Ct. at 618-19; *Gibbs*, 383 U.S. at 726-27. However, the federal court still has the discretion to assert pendent jurisdiction in such cases. *See Cohill*, 108 S.Ct. at 619 n.7.

In this case, though, the federal court clearly had no power to embark on a *Gibbs* analysis. For, pendent jurisdiction does not override a state's immunity under the Eleventh

Amendment. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 251 (1985); Pennhurst, 465 U.S. at 121; Silver, 804 F.2d at 1213. Thus, the Eleventh Amendment bars jurisdiction over even the pendent state claims brought against HRS, and the pendent jurisdiction question never really arose. Although the court may have had the power to exercise pendent jurisdiction if a non-state had been the defendant,³ it had no power to exercise pendent jurisdiction over this claim.⁴

Conclusion

For all of the above reasons, we find that there was no jurisdiction in this case.

AFFIRMED.

1. See, e.g., Atascadero State Hospital v. Scanlon, 472 U.S. 234, 259-302 (1985) (Brennan, J., dissenting) (discussing the language and history of the amendment to support the contention that "[t]here simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against states from federal court," id. at 259).

2. The Ondrizeks also suggest that the present Supreme Court would overrule Hans today if faced with the issue. Therefore, they argue, we should refuse to follow the existing Supreme Court precedent. However, we are bound by that precedent and will not try to predict how the Supreme Court would rule on the Hans issue today. If and when the Court overrules Hans, we will follow their dictate.

3. When there is no Eleventh Amendment problem and there is no compelling reason for a federal court to hear a state claim, it may constitute an abuse of discretion for a federal court to assert jurisdiction. See, Maguire v. Marquette University, 814 F.2d 1213, 1218 (7th Cir. 1987) (federal court erred in retaining jurisdiction where district court did not state, and record did not reveal, any "pressing" reasons

for this action). In such a case, although a district court technically has discretion to reach its decision, it actually only has the ability to decide to dismiss the pendent claim.

4. For the same reason that HRS' initial procedural defect did not waive its Eleventh Amendment immunity defense, HRS' initial failure to argue that the Eleventh Amendment bars the pendent state claims does not operate as a waiver of the defense.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-682-Civ-Atkins

JOSEPH and CONSTANCE
ONDRIZEK, ETC., ET. AL.

Plaintiffs,

v.

FLORIDA DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the court on
defendant North Central Florida
Community Mental Health Center, Inc.'s
("MHC") motion for summary judgment and
motion to dismiss the pendent state law
claim. After careful consideration of
all the documents submitted and the
relevant law, it is ORDERED AND ADJUDGED

that this motion is GRANTED. In addition, the motion to dismiss the pendent state law claim is granted.

Early in 1984, the plaintiff Constance Ondrizek, suffering from a mental disorder, was hospitalized for several weeks. During this period, the Ondrizeks entrusted the care of their children, Alison, Ian, and Austen, to Joseph Ondrizek's sister and her husband, Mary and Richard Devlin. After Alison began to exhibit bouts of unusual behavior, Mary Devlin, suspecting that the child had been sexually abused, filed a complaint with the Florida Department of Health and Rehabilitative Services ("HRS").

HRS referred Alison to the defendant MHC for evaluation and treatment where

she was seen by Dr. Sandra Sullivan on at least four occasions. See Deposition of James Winters at 21. Dr. Sullivan did not furnish HRS with a formal written report, nor was she asked to testify at any of the dependency hearings that ensued. See Deposition of Sandra Sullivan at 28; Deposition of James Winters at 25. In fact, a patient's medical file is released only upon signature of the patient's legal custodian. See Deposition of James Winters at 25.

During May of 1985, a dependency hearing was held in the circuit court in Alachua County to consider a detention petition prepared by HRS which alleged that the Ondrizeks had abused and neglected their children. The Ondrizeks

were not present at the hearing. On May 23, 1985, the court entered an ORDER for Emergency Detention.

On May 30, 1985, HRS filed a second petition. The Alachua Juvenile Court issued a summons to the Ondrizeks advising them of a hearing on June 19, 1985. At that hearing, HRS opposed the Ondrizeks' efforts to regain the custody of their children. The court set a trial for August of 1985. On August 8, the Juvenile Court withheld adjudication of dependency and placed the children with relatives in North Miami and the Ondrizeks were granted reasonable visitation. HRS was directed to file a petition seeking return of the children to the Ondrizeks. The children were returned to their parents in January of

1986 and the Ondrizeks filed this action against HRS and MHC in 1987.

The plaintiffs filed this action for damages under the federal civil rights statutes and common law theory of negligence invoking this Court's jurisdiction pursuant to 28 U.S.C. section 1331, 1343, 2201, 2202 and pendent jurisdiction. The plaintiffs allege violations of their constitutional right to due process, right to equal protection, violation of the Rehabilitation Act, and negligence. The defendant HRS was dismissed under the Eleventh Amendment immunity doctrine. MHC now seeks summary judgment on the civil rights claims and dismissal of the pendent state law claim.

The plaintiffs seek to impose liability on the defendant MHC under 42 U.S.C. section 1983 for alleged violations of their civil rights. Count I alleges that the plaintiffs' right to enjoy an interpersonal relationship as a family, free from undue interference by the government, was placed in jeopardy without affording them a full and fair opportunity to be heard. Count II alleges that the plaintiffs right to be free from unreasonable discrimination on the basis of a mental handicap was violated because a substantial, if not overriding, motive behind the defendant's actions was Constance Ondrizek's illness. Count III alleges that Constance Ondrizek's mental illness qualifies her as a handicapped individual as defined by the

Rehabilitation Act, 29 U.S.C. section 794, and the plaintiffs suffered discrimination by reason of her illness. Finally, Count IV alleges that the defendant MHC acted negligently in its evaluation of Alison Ondrizek and that HRS acted negligently in its investigation and filing of the detention petitions.

Title 42 U.S.C. section 1983 requires that a plaintiff show that the defendant acted under color of state law to deprive them of a right protected by the constitution and laws of the United states. See White v. Scrivner Corp., 594 F.2d 140, 141 (5th Cir. 1979) (citing Flagg Bros, Inc. v. Brooks, 436 U.S. 144 (1978)). The complaint and the depositions filed in support of the

motion for summary judgment are devoid of any facts that might be construed to find that MHC acted "under color of state law." The plaintiffs acknowledge that the defendant MHC is "a private corporation. See Plaintiffs' Memorandum of Law in Reply (sic) to Defendant's Motion for Summary Judgment at 8. It is true that a private individual's performance of public functions may be attributed to the state. See White v. Scrivner Corp., 594 F.2d at 142. The Supreme Court has determined, however, that such an attribution of state action to a private individual is appropriate only when it performs a function that is "exclusively reserved to the state." Flagg Bros, Inc. v. Brooks, 436 U.S. at 157. The plaintiffs here urge that the defendant's evaluation and treatment

of the child was a public function. Such a result is unwarranted. The definition of public function is very narrow. It includes activities such as the conduct of elections, See, e.g., Terry v. Adams, 345 U.S. 461 (1953), and the performance of municipal functions in a "company town." See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946). No basis exists for finding that evaluation and treatment of a child for suspected child abuse is a public function. The facts show that MHC evaluated and treated the child, made no formal recommendation to HRS, did not participate in the filing of the detention petitions, did not attend or otherwise participate in the dependency hearings. Since MHC performed no act that may be defined as a public

function, it did not act under color of state law for the purposes of liability under 42 U.S.C. section 1983.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and affidavits show that there exists no genuine issue of material fact. Fed.R.Civ.Pro. 56(a). The Supreme Court has moved a step further by interpreting Fed.R.Civ.Pro. 56(A) as mandating entry of summary judgment after a sufficient time for discovery, upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will have the burden of proof. See Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986). The

standard for summary judgment mirrors that for a directed verdict under Fed.R.Civ.Pro. 50(a) and asks if the evidence is so one sided that one party must prevail as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986). Although the moving party has the burden of demonstrating the basis of its motion, the opposing party must produce evidence in the form of specific facts that would support a jury verdict. Mere denials or allegations are not sufficient to form a genuine issue of material fact. See Anserson, 106 S.Ct. at 2514.

In the instant case, the defendant has amply demonstrated to the court the basis of its motion. The plaintiffs have failed to present evidence that

there exists a genuine issue of material fact and therefore defendant's motion for summary judgment is granted on Counts I, II and III.

Implicit in the concept of pendent jurisdiction is the existence of jurisdiction over the parties involved because of diversity or because of the presence of a federal question. See Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985). A federal court may exercise pendent party jurisdiction over a party whose claim asserts purely state law violations if that claim arose from a common nucleus of operative facts that gave rise to a federal claim against another party properly before the court. Questions of judicial economy dictate that the claims

be tried together. See Giardiello v. Ba;lboa Insurance Co., ___ F.2d ___ (11th Cir. 1988). Such is not the case before this court which has no independent jurisdiction to consider the state law claim. Unlike Giardiello, the situation before this court did not give rise to a simultaneous federal basis for jurisdiction over this party or another. The claim was and is a state law claim. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). Since the claim is not time barred, there exists a state forum to entertain a suit. See Shahawy v. Harrisonb, 778 F.2d 636 (11th Cir.

1985).

DONE AND ORDERED at Miami, Florida
this 8th day of April, 1988.

(signed)
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-682-Civ-Atkins

JOSEPH and CONSTANCE
ONDRIZEK, ETC., ET. AL.

Plaintiffs,

v.

FLORIDA DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants.

ORDER GRANTING MOTION TO
DISMISS AMENDED COMPLAINT

THIS CAUSE is before the court on
defendant Florida Dept of Health and
Rehabilitative Services' Motion to
Dismiss the Plaintiffs' Amended
Complaint. After careful consideration
it is,

ORDERED AND ADJUDGED that this motion
is GRANTED.

This court granted defendant HRS' Motion to Dismiss the initial complaint on the grounds of eleventh amendment immunity. The plaintiffs were granted leave to amend within ten days to allege an express waiver of the state's immunity. The plaintiffs have failed to do so.

Counts I and II allege violations of Constitutional rights of equal protection and due process. The Supreme Court has stated that "if a section 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 120 (1984).

Count III alleges a violation of the Rehabilitation Act. In Antascadero State Hosp. v. Scanlon, 105 S.Ct. 3142 (1984) the Supreme Court explicitly stated that the mere receipt of federal funds by a state does not act as a waiver of eleventh amendment immunity.

v

Fla. Stat. sections 409.026(2) and (5) are not express waivers for the purposes of eleventh amendment immunity. Absent an express waiver, this court is bound by precedent to dismiss the amended complaint. See, Edelman v. Jordan, 415 U.S. 651 (1974).

Accordingly, the complaint against the defendant Florida Department of Health and Rehabilitative Services is dismissed with prejudice.

DONE AND ORDERED at Miami, Florida
this 25th day of September, 1987.

(signed)
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-682-Civ-Atkins

JOSEPH and CONSTANCE
ONDRIZEK, ETC., ET. AL.

Plaintiffs,

v.

FLORIDA DEPARTMENT OF HEALTH
AND REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE is before the court on defendant, North Central Florida Community mental health Center, Inc.'s ("MHS") Motion to Dismiss. After reviewing the motion, memoranda, and the relevant law, it is

ORDERED AND ADJUDGED that this motion is DENIED.

The defendant asserts that there exists no basis for federal jurisdiction under 42 U.S.C. section 1983 because MHS, as a private corporation, has not acted "under color" of state law as required by the statute. In addition, MHS challenges plaintiffs' complaint on the grounds that it failed to allege that the defendant MHS had the power or in fact did any act to deny plaintiffs' due process rights in contravention of section 1983.

To act "under color of" state law for purposes of section 1983 does not require that the defendant be an officer of the state. Dennis v. Sparks, 449 U.S. 24, 27 (1980). Private persons jointly engaged in deliberate action with state officials in the challenged

action are acting "under color of" state law for purposes of section 1983. Id. at 28 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966)). Neither it is (sic) a defense that the state official is immune from damages liability. Dennis, at 28.

The Federal Rules of Civil Procedure do not require that a plaintiff set forth his claim in detail. The rules require "a short and plain statement of the claim," Fed.R.Civ.P.8(a)(2), so as to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). Keeping in mind this standard, the plaintiffs' complaint is sufficient

to avoid dismissal.

DONE AND ORDERED at Miami, Florida
this 9th day of July, 1987.

(signed)
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 87-5942, 88-5404, 88-5414
Non-Argument Calendar

D.C. Docket No. 87-0682

JOSEPH ONDRIZEK and
CONSTANCE ONDRIZEK, individually
and as guardians for ALISON
AUSTEN and IAN ONDRIZEK,

Plaintiffs-Appellants,
versus

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants-Appellees.

Appeals from the United States District
Court for the Southern District of Florida

Before FAY, HATCHETT and ANDERSON,
Circuit Judges.

J U D G M E N T

These causes came on to be heard on the
transcript of the record from the United
States District Court for the Southern

District of Florida, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 26, 1988
For the Court: Miguel Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: January 13, 1989

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 87-5942, 88-5404, 88-5414

JOSEPH ONDRIZEK and
CONSTANCE ONDRIZEK, individually
and as guardians for ALISON
AUSTEN and IAN ONDRIZEK,

Plaintiffs-Appellants,
versus

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants-Appellees.

Appeals from the United States District
Court for the Southern District of Florida

Before FAY, HATCHETT and ANDERSON,
Circuit Judges.

PER CURIAM:

This matter is before the Court upon

appellants' petition for rehearing. As appellants' correctly point out, the three different appeals filed in this court have been the subject of some confusion. The first appeal, docketed as 87-5942, dealt with the district court's dismissal of the suit as against the Florida Department of Health and Rehabilitative Services (HRS). We affirmed that ruling in a per curiam opinion dated October 26, 1988, which remains in full force and effect. While that opinion was being processed administratively, two other appeals were consolidated with the earlier one. These two new appeals, docketed as 88-5404 and 88-5514, dealt with the granting of summary judgment in favor of North Central Florida Community Mental Health Center, Inc. (MHC).

Unfortunately, when our opinion issued on October 26, 1988, it was not noted that the appeals in 88-5404 and 88-5514 had been consolidated. The clerk issued the opinion under all three appellate numbers because the matters had been consolidated. Appellants correctly point out that we have not ruled upon the questions raised in the appeals dealing with MHC.

In brief, the district court granted summary judgment in favor of MHC based upon the absence of the "state action" required under 42 U.S.C. section 1983. As to that claim, we affirm the judgment for the reasons stated in the district court's Order Granting Defendant's Motion for Summary Judgment entered April 8, 1988.

Appellants also contend that the district court erred in granting summary judgment because of their alleged claim under the "Rehabilitation Act," 29 U.S.C. section 794. A review of the file, however, convinces us that there is simply no evidence that the defendant MHC discriminated in any way against appellants. The fact that MHC treated Connie Ondrizek does not, standing alone, equate with acts attempting to separate the Ondrizek family. MHC cannot be held responsible for the actions taken by HRS or the state judicial officers involved. MHC was entitled to summary judgment on this claim and the ruling is affirmed.

The question of pendent jurisdiction was dealt with in our earlier opinion

but, in addition, as to those state claims made against MHC we find no abuse of discretion by the district court in its refusal to retain jurisdiction.

The judgment of the district court is affirmed in all respects.